No. 18-315

In The
Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND THE PARSONS CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.* BILLY JOE HUNT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The False Claims Act establishes two distinct, alternative statute of limitations periods. Under 31 U.S.C. § 3731(b)(1), a False Claims Act civil action "may not be brought more than 6 years after the date" of the alleged violation. Under 31 U.S.C. § 3731(b)(2), a False Claims Act civil action "may not be brought more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date" of the alleged violation.

The question presented is whether a relator in a False Claims Act *qui tam* action may rely on the statute of limitations in 31 U.S.C. § 3731(b)(2) in a suit in which the United States has declined to intervene and, if so, whether the three-year limitations period in 31 U.S.C. § 3731(b)(2) begins to run from the date of the relator's knowledge of the alleged false claim, or from the date of the responsible government official's knowledge of the alleged false claim.

PARTIES TO THE PROCEEDING & RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Respondent Billy Joe Hunt is an individual without any corporate status.

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The court of appeals' opinion is reported at 887 F.3d 1081. Pet. App. 1a. The district court's opinion is available at 2016 WL 1698248. *Id.* at 32a.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2018. On June 28, 2018, Justice Thomas granted an extension of time for filing the petition for a writ of certiorari until September 8, 2018. No. 17A1390. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

31 U.S.C. § 3731(b) provides:

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the

violation is committed, whichever occurs last.

The False Claims Act, 31 U.S.C. §§ 3729-3733, is reproduced in full in Appendix C to the petition. Pet. App. 41a.

STATEMENT

The Eleventh Circuit's decision below created an explicit three-way split among the six circuits that have addressed how 31 U.S.C. § 3731(b)(2) of the False Claims Act ought to be construed. Congress enacted Section 3731(b)(2) in 1986 as an alternative to the Act's then-existing six-year statute of limitations.

The 1986 amendment created two distinct limitations periods for the False Claims Act: (1) "6 years after the date on which the violation of section 3729 is committed," 31 U.S.C. § 3731(b)(1), or (2) "3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed," *id.* § 3731(b)(2).

In the 32 years since Congress added Section 3731(b)(2), the federal courts have interpreted the provision in three competing ways. The Eleventh Circuit's opinion discussed all three views. Some circuits limit Section 3731(b)(2) to False Claims Act suits filed by the government or in which the government has intervened. Pet. App. 21a (citing and rejecting decisions of the Fourth and Tenth Circuits

as impermissible reformulations of the statute's plain meaning). Another construction holds that where the United States declines to intervene, the relator is the relevant "official of the United States" whose knowledge triggers the statute of limitations in Section 3731(b)(2). *Id.* at 30a ("reject[ing] the Ninth Circuit's interpretation" as a "legal fiction" "inconsistent with th[e] text" of the statute). *Id.*

The Eleventh Circuit chose neither of these interpretations, opting instead to construe Section 3731(b)(2) literally, according to its express statutory language. *Id.* at 14a, 29a-30a (holding that the statute's construction is controlled by its plain meaning); *see also* Pet. 22-23 (describing Eleventh Circuit's mode of statutory construction as "literal"). The Eleventh Circuit held that a False Claims Act relator can invoke the ten-year Section 3731(b)(2) limitations period regardless of whether the United States intervenes in the suit, so long as the relator files suit within three years of the knowledge of the relevant "official of the United States." Pet. App. 14a. The court further held that under the Act's express language, the plain meaning of "official of the United States" is not the relator initiating the *qui tam* action, but the individual employed by the federal government who is made aware of the facts underlying the suit. *Id.* at 29a-31a; *see also id.* at 54a (citing Section 3731(b)(2)).

This three-way circuit split has left False Claims Act litigants and federal trial courts in the capricious position of having the viability of such suits determined by the accident of geography and ongoing guesswork. In the Fourth, Fifth, and Tenth Circuits,

relators may invoke Section 3731(b)(2)'s ten-year limitations period only if the government intervenes. In the Third and Ninth Circuits, by contrast, a relator may rely on the ten-year limitations period regardless of the government's intervention, but with the statute's knowledge requirement based on his own knowledge, rather than the knowledge of the relevant government official. Diverging from both of these judicial reconstructions and relying on the plain statutory language, the Eleventh Circuit holds that Section 3731(b)(2) permits a relator to bring a *qui tam* action within ten years of the underlying violation, provided the suit is filed within three years of the relevant government official having knowledge of the facts material to the action. And in the six remaining circuits, would-be relators and defendants lack guidance as to which of these competing limitations periods controls their claims, which, in turn, must be surmised by the district court judges to whom their cases are assigned. This Court should grant review to establish uniformity to the False Claims Act and foreclose the judicial rewriting of the Act's clear statutory language, which rewriting undermines the mechanisms by which Congress sought to encourage the recoupment of funds defrauded from the government.

1. Congress enacted the False Claims Act in 1863 to "stop[ ] the massive frauds perpetrated by large contractors during the Civil War." *Universal Health Servs., Inc., v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016) (internal quotation marks omitted). Congress has repeatedly amended the Act, which, in its current iteration, imposes civil liability in the form of treble damages, as well as civil

penalties, on persons who make false or fraudulent claims for payment to the United States. Pet. App. 7a.; 31 U.S.C. § 3729(a).

A False Claims Act suit can be filed either by the Attorney General, 31 U.S.C. § 3730(a), or by private persons, known as relators, who sue on the federal government's behalf, *id.* § 3730(b). In bringing a *qui tam* action, the relator, "in effect, su[es] as a partial assignee of the United States." *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 n.4 (2000) (emphasis omitted). The relator must file a complaint under seal within the statute of limitations prescribed by Section 3731(b) and notify the government of the filing. While the lawsuit remains under seal, the United States has the opportunity to investigate and decide whether to intervene as a party. It may do so, and assume primary control over the litigation, or allow the relator to continue the suit alone on the government's behalf. *Id.* § 3730(b), and (c)(1) and (3). The United States owns any recovery obtained in a *qui tam* action, regardless of whether the government has intervened. Pet. App. 11a. A relator is entitled to a variable share of any recovery, depending on whether the government has intervened and the significance of the relator's contribution to the action, as well as costs and attorneys' fees. 31 U.S.C. § 3730(d)(1) and (2).

Congress enacted the current version of the False Claims Act's statute of limitations in 1986. *See* Pub. L. No. 99-562, § 5 (Oct. 27, 1986). Before that date, the False Claims Act's limitations provision simply provided that "a civil action under section 3730

of this title must be brought within 6 years from the date the violation is committed." 31 U.S.C. § 3731(b) (1982); *see also* Pub. L. No. 97-258 (Sept. 13, 1982). The 1986 amendment created two distinct and independent limitations deadlines: (1) "6 years after the date on which the violation of section 3729 is committed," 31 U.S.C. § 3731(b)(1), or (2) "3 years after the date when the facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed," *id.* § 3731(b)(2).

2. Petitioner, The Parsons Corporation ("Parsons"), is an engineering, construction, technical, and management firm that provided services under contracts with the United States government during the Iraq and Afghanistan wars, including a $60 million U.S. Army Corps of Engineers contract—referred to as the Coalition Munitions Clearance Project or the "CMC contract"—for the cleanup of munitions left behind by retreating or defeated enemy forces. Dist. Ct. D.E. 1 (Compl.) ¶¶ 20, 46-49; Pet. App. 3a. Petitioner, Cochise Consultancy, Inc. ("Cochise"), is a security services contractor. Dist. Ct. D.E. 1 (Compl.) ¶ 21. Cochise was awarded a subcontract and task orders by Parsons under the CMC contract to provide security to Parsons employees, their subcontractors, and others working on the project. Pet. App. 3a-5a.

Respondent Billy Joe Hunt ("Hunt") is a former Parsons employee who worked in Iraq and managed the CMC contract's day-to-day operations. *Id.* at 3a.

His complaint alleges that Parsons and Cochise conspired to make false claims upon the government though a bid-rigging and bribery scheme that charged the government for security services on the CMC contract at grossly inflated rates, or for services that were not provided at all.[1] Pet. App. 3a-5a; *see also* Dist. Ct. D.E. 1 (Compl.) ¶¶ 1-9, 46-82.

As alleged in Hunt's complaint, Parsons initially awarded the subcontract to an entity called ArmorGroup. Pet. App. 3a. But, Cochise then bribed an Army Corps of Engineers officer, Wayne Shaw, to direct Parsons employees, including Hunt, to issue a directive rescinding the initial award to ArmorGroup and awarding the contract to Cochise instead. *Id.* at 3a-4a. When the Parsons employees initially refused to issue the directive, Shaw forged one, *id* at 4a, which Hunt personally observed. Dist. Ct. D.E. 1 (Compl.) ¶ 69.

Eventually, Hunt alleges, Cochise succeeded in obtaining the subcontract from Parsons and provided security services from February 2006 through September 2006. Each month, the government incurred more than $1 million in additional charges to pay Cochise than if the contract had been awarded to the bid winner, ArmorGroup. The fraudulent scheme resulted in other additional charges to the government, such as approximately $2.9 million to

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[1] Relying on dicta in the district court's opinion, petitioners suggest that Hunt may have been involved in the fraudulent scheme. Pet. 19, citing Pet. App. 34a. There is no factual record at this stage of the case, and Hunt disputes any implication that he was responsible for the fraudulent scheme between Parsons and Cochise alleged in the complaint.

purchase armored vehicles for Cochise that ArmorGroup already had and would have provided under the contract at no additional cost. Pet. App. 5a. When Shaw left Iraq, Parsons reopened bidding on the contract and immediately awarded it to ArmorGroup. *Id.*

Several years later, on November 30, 2010, FBI agents interviewed Hunt about his role in an unrelated kickback scheme. *Id.* In that interview, Hunt told the agents about the fraudulent scheme between Cochise and Parsons relating to the munitions-clearing project. *Id.* Hunt ended up pleading guilty for his role in the separate kickback scheme and served ten months in prison. *Id.*

3. After his release from prison, Hunt filed under seal this False Claims Act suit against petitioners on November 27, 2013. He alleges that Cochise "fraudulently induced the government to enter into the subcontract . . . by providing illegal gifts to Shaw and his team," and that petitioners had "a legal obligation to disclose credible evidence of improper conflicts of interest and payment of illegal gratuities to the United States but failed to do so." *Id.* at 6a. The United States declined to intervene on January 29, 2015, and the complaint was unsealed. *Id.* at 33a n.2, 6a.

Petitioners moved to dismiss on the ground that the suit was barred by the six-year statute of limitations in Section 3731(b)(1) because Hunt had filed suit approximately seven years after the alleged fraud. *Id.* at 6a. Hunt conceded that his complaint would be time-barred under Section 3731(b)(1), but

maintained that the action was still timely under the alternative statute of limitations in Section 3731(b)(2) because it had been filed within three years of the date on which Hunt had informed the government of the alleged fraud during his 2010 FBI interview. *Id.*

The district court concluded that Hunt could not rely on Section 3731(b)(2) to establish the timeliness of his complaint. Acknowledging that "[t]here is a split among the Circuit courts which have decided th[is] particular issue," and that the Eleventh Circuit had not yet taken a position, the district court held that the complaint was time-barred under either then-existing appellate interpretation of Section 3731(b)(2). *Id.* at 35a-40a. Specifically, the district court held that Section 3731(b)(2)'s three-year statute of limitations was either unavailable to Hunt because the United States had declined to intervene in the action, or had expired because it began to run when Hunt learned of the alleged fraud in 2006. *Id.* at 37a. The district court therefore dismissed the complaint. *Id.* at 40a.

4. The Eleventh Circuit reversed, finding the analyses of the other circuit courts to be at odds with the unambiguous statutory text, and that the statute's plain meaning is rationally related to the congressional purpose of encouraging False Claims Act suits after the government has declined to intervene. Pet. App. 13a-15a, 18a-21a. The Eleventh Circuit expressly held that a relator can rely on the limitations period established by Section 3731(b)(2) in cases where the United States has not intervened. In so doing, the court acknowledged that its conclusion was "at odds with the published decisions of two other

circuits." *Id.* at 21a (citing *United States ex rel. Sanders v. N. Am. Bus. Indus., Inc.*, 546 F.3d 288, 293 (4th Cir. 2008); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726 (10th Cir. 2006)). The Eleventh Circuit further held that, in cases where the United States has declined to intervene, the three-year limitations period in Section 3731(b)(2) is triggered by the relevant federal government official's knowledge of the alleged False Claims Act violation, not by the relator's knowledge. *Id.* at 29a-31a. The Eleventh Circuit thereby explicitly "reject[ed] the Ninth Circuit's interpretation" that a relator can be the relevant "official of the United States" under Section 3731(b)(2) as a "legal fiction" "inconsistent with th[e] text" of that provision. *Id.* at 30a (citing *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996)).

Because "Hunt alleged that the relevant government official learned the material facts on November 30, 2010 when he disclosed the fraudulent scheme to FBI agents, and he filed suit within three years of this disclosure," the Eleventh Circuit concluded that the district court had "erred in dismissing his complaint on statute of limitations grounds." *Id.* at 31a.

ARGUMENT

I. THERE IS A THREE-WAY CIRCUIT SPLIT AS TO WHETHER AND WHEN FALSE CLAIMS ACT RELATORS MAY INVOKE SECTION 3731(b)(2).

Petitioners correctly summarize the three irreconcilable interpretations of Section 3731(b)(2) adopted by the courts of appeals. Pet. 11-18 (Part I.A-I.C). Three circuits hold that Section 3731(b)(2) applies only in cases filed or intervened by the United States, and that in all other cases, relators benefit only from the six-year limitations period established by Section 3731(b)(1). *See Sanders*, 546 F.3d at 293-95 (4th Cir. 2008); *United States ex rel. Erskine v. Baker*, 213 F.3d 638, 2000 WL 554644 at *1 (5th Cir. April 13, 2000) (per curiam) (unpublished opinion); *Sikkenga*, 472 F.3d at 725-26 (10th Cir. 2006). The Eleventh Circuit fully considered the *Sanders/Sikkenga* analyses, and rejected them, holding that Section 3731(b)(2)'s unambiguous statutory language applies to all relators, even in non-intervened cases. Pet. 13a-17a. Further, the court found the contention that this would lead to absurd results to unavailing, holding that Congress could have rationally desired relators to pursue False Claims Act cases even when the government did not intervene, and that the Act's other provisions would temper the potential abuses contemplated in *Sanders* and *Sikkenga*. *Id.* at 18a-24a, 29a.

In stark contrast with the Fourth, Fifth, and Tenth Circuits, two other circuits hold that Section 3731(b)(2) does apply to relators in non-intervened

cases, but that the limitations period is triggered by the *relator's* knowledge of the alleged fraud, not by the government's knowledge. *See United States ex rel. Malloy v. Telephonics Corp.*, 68 F. App'x. 270, 273 (3rd Cir. 2003); *Hyatt*, 91 F.3d at 1215-18 (9th Cir. 1996). The Eleventh Circuit also reviewed and rejected the *Hyatt* analysis, holding that Section 3731(b)(2) expressly provides that "it is the knowledge of a government official, not the relator, that triggers the limitations period," because "[n]othing in the statutory text or broader context suggests that the limitations period is triggered by the relator's knowledge." Pet. App. 30a. *Hyatt*'s counter-textual conclusion, the Eleventh Circuit observed, "created a new legal fiction that because the relator sue[d] on behalf of the government, the relator became a government agent and the government official charged with responsibility to act." *Id.* (internal citation and quotation omitted).

Having thoroughly examined these two disparate interpretations, the Eleventh Circuit instead chose a third course: To construe Section 3731(b)(2) by its plain statutory meaning, and without reformulating it according to judicial policy preferences. *Id.* at 14a-24a, 29a-31a. *See also Sikkenga*, 472 F.3d at 736 (Hartz, J., concurring in part, dissenting in part) (concurring with the majority that *Hyatt*'s interpretation of Section 3731(b)(2) is untenable under the plain statutory terms, but dissenting on the ground that the text was unambiguous and not the proper subject of judicial rewriting to obtain a policy result inconsistent with what Congress could plausibly have chosen).

II. THE ELEVENTH CIRCUIT'S DECISION, WHICH FOLLOWS UNAMBIGOUS STATUTORY TEXT AND UPHOLDS THE RATIONAL CONGRESSIONAL GOAL OF ENCOURAGING RELATORS TO FILE FALSE CLAIMS ACT SUITS WHEN THE GOVERNMENT DOES NOT INTERVENE, DOES NOT CONFLICT WITH THE COURT'S OPINION IN *GRAHAM*.

Positing that the Eleventh Circuit's decision creates absurd results, petitioners assert that the court's construction of Section 3731(b)(2) is textually anomalous in the larger context of the False Claims Act as a whole, thereby running afoul of this Court's teaching in *Graham County Soil & Water Conservation District v. United States ex. rel. Wilson*, 550 U.S. 409 (2005). Petitioners are mistaken: the absurdity doctrine may not be invoked merely because the plain meaning of a statute creates outcomes that are unfavorable to a party or even a class of parties; the doctrine applies only when the absurdity is "so gross as to shock the general moral or common sense." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). The result countenanced by the Eleventh Circuit is not only not absurd, but entirely consistent with the congressional purpose encompassed by the False Claims Act to encourage the recoupment of stolen taxpayer funds.

The "fundamental canon of statutory construction [is] that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" and that a court should "fit, if possible, all parts into a harmonious whole."

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000) (internal quotation marks omitted). In *Graham*, the Court held that while the False Claims Act's retaliation suit provision, 31 U.S.C. § 3730(h), facially appeared to fall within the Act's six-year limitations period for "civil actions" brought under the Act, *id.* § 3731(b), such a reading was incongruous with the statute in its entirety, and at odds with the very purpose of creating a distinct cause of action for retaliation that might actually be employed by a plaintiff. *Graham*, 545 U.S. at 413-17. Applying the Act's limitations period to the retaliation provision, with the period accruing upon the making of a false claim, would be absurd. If applied as written, the limitations period could begin before the putative plaintiff had been retaliated against, even if the plaintiff was not a relator and the retaliation occurred after the underlying false claim, and even though the government (to whom the phrase "civil action under section 3730" was directed) was not ordinarily a party to retaliation suits. *Id.* at 416-22; *see also* Pet. App. 15a-17a (Eleventh Circuit explaining *Graham*'s lack of utility in analyzing Section 3731(b)(2)).

"[N]othing in *Graham* ... directly addressed whether the statutory context shows that § 3731(b)(2)'s limitations period is available only when the government is a party." Pet. App. 17a. As the Eleventh Circuit explained, "in the unique context of an FCA *qui tam* action . . . even though the United States is not a party to a non-intervened [case], the United States remains the real party in interest and retains significant control over the case . . . . [T]he relator brings the suit as the partial assignee of the

United States, and asserts a claim based on injury suffered by the United States as the victim of the fraud." *Id.* at 19a. "[A]s the victim of the fraud, the United States—not the relator—is entitled to the bulk of the recovery." *Id.* at 20a. The government maintains the "primary interest" even in a non-intervened suit, with Congress granting it the right to obtain pleadings and discovery in the litigation, to stay discovery in light of competing governmental interests, to veto a relator's decision to dismiss the action, and to intervene at any time upon a showing of good cause. *Id.* "Allowing relators to continue to pursue FCA claims even after the government declines to intervene is consistent with the broad underlying purpose of the FCA because it creates the potential for more fraud to be discovered, more litigation to be maintained, and more funds to flow back into the Treasury." Pet. App. 25a (internal citation and punctuation omitted).

Neither *Graham* nor the False Claims Act taken *in toto* remotely suggests, much less "make[s] plain the intent of Congress that the letter of [Section 3731(b)(2)] is not to prevail." *Crooks*, 282 U.S. at 60. Notwithstanding petitioners' suggestion of absurdities resulting from the Eleventh Circuit's literal construction of Section 3731(b)(2), Pet. 22-23, the statutory scheme devised by Congress accounts for the competing considerations arising under the Act. For instance, petitioners argue that permitting relators to invoke Section 3731(b)(2) absent government intervention would eviscerate the six-year limitations period of Section 3731(b)(1) "in the vast majority of cases" and give relators a financial incentive to let their claims accumulate. Pet. at 22-

23. But petitioners ignore the entirely reasonable possibility that Congress would not wish to foreclose relators from bringing *qui tam* actions that could result in dismantling frauds against the government, and thus would not want relators to be prejudiced when, after investigation, the government elects not to intervene after the six-year limitations period under Section 3731(b)(1) has expired. *See* Pet App. 12a, n.6 (Eleventh Circuit discussing many of the pragmatic factors influencing the government's decision to intervene in False Claims Act suits); *see also Sikkenga*, 472 F.3d at 736 (Hartz, J., dissenting) ("Congress could well have decided that a relator should not be time-barred if the government is not."). Petitioners also ignore "that other provisions of the FCA create strong incentives to ensure that relators promptly report fraud," lest their claims be lost or their recoveries diminished. Pet. App. 23a-24a.

Similarly overwrought is petitioner's prediction of "innumerable headaches" arising in discovery for defendants and the government if the knowledge of the "non-party" relevant government official is put at issue under Section 3731(b)(2). Pet. 22-23. In point of fact, the "non-party" government is always the real party in interest in False Claim suits, Pet. App. 19a, and the False Claims Act already puts governmental knowledge at issue under the Act's scienter and materiality requirements. *Id.* at 22a, n.10 (citations including 31 U.S.C. § 3729(a)(1)). In the fraction of False Claims Act cases that go forward after the government elects not to intervene and the six-year limitations period under Section 3731(b)(1) has expired, a simple declaration from the relevant government official should suffice in most cases to

establish the date the government learned of the fraud. *Cf. United States ex rel. Bahrani v. ConAgra, Inc.*, 624 F.3d 1275, 1287 (10th Cir. 2010) (finding relator's affidavit sufficient to establish he was "original source" of false claims allegations under 31 U.S.C. § 3730(e)(4)).

"[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1997). Petitioners acknowledge that the Eleventh Circuit's interpretation of Section 3731(b)(2) is the literal one. Pet. 22-23. Though petitioners might prefer to escape the False Claim Act's strictures, Congress has made the entirely reasonable choice that relators ought to be able to pursue *qui tam* actions within three years of the government failing to act on knowledge of the underlying fraud, provided that they do so within ten years of that fraud. Pet. App. 18a-22a; *accord*, *Sikkenga*, 472 F.3d at 735-36 (Hartz, J., dissenting) (the absurdity doctrine cannot apply where the outcome dictated by Section 3731(b)(2)'s plain textual meaning is a plausible congressional policy choice). Petitioners' invocation of *Graham* is a prayer for the Court to create statutory ambiguity where none exists in pursuit of a policy outcome that Congress did not choose. The Court should reject it.

III. THE COURT SHOULD RESOLVE THE CONFLICTING INTERPRETATIONS OF SECTION 3731(b)(2) TO ELIMINATE THE ONGOING CONFUSION, UNPREDICTABILITY, AND UNFAIRNESS IN THE FALSE CLAIMS ACT'S APPLICATION IN THE FEDERAL COURTS.

Hunt agrees with petitioners that the current division among the circuits in construing Section 3731(b)(2) leaves litigants in the aberrant position of having the False Claims Act's potential application determined by the accident of geography rather than a uniform standard set by Congress. *Cf. Martin v. Hunter's Lessee*, 14 U.S. 304, 347-48 (1816) (discussing the need for the federal judiciary to establish uniformity in the application of federal law). It is not only defendants who are exposed to the unfairness of the current disparate interpretations; would-be relators in the Fourth, Fifth, and Tenth Circuits are precluded from filing their own *qui tam* suits if the government does not file suit before the six-year limitations period under Section 3731(b)(1) expires. In the Third and Ninth Circuits, defining the relator as the relevant government officials denies the actual government officials with primary responsibility to act on such frauds the full opportunity to investigate and determine if the government itself should bring the suit, thereby forcing—if the fraud is to be contested—potential relators to themselves bring *qui tam* actions that might otherwise be optimally brought by the government. Under either interpretation, it is the government that is ultimately disadvantaged by the

stymieing of suits that will return fraudulently obtained federal funds.

In the Eleventh Circuit, potential relators have two options: they can (1) file suit within six years of the violation regardless of what action the government is taking, per Section 3731(b)(1); or, (2) if the government investigates, but elects not to bring a False Claims suit, potential relators may take it upon themselves to protect the public fisc, provided they do so within ten years of the underlying violation and three years of the government's initial knowledge of the fraud.

In the remaining six circuits lacking definitive appellate decisions, these competing interpretations have left litigants and judges entirely at sea. Intra-circuit splits have arisen among the district courts in the D.C. Circuit, *compare, e.g., United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 474 F. Supp. 2d 75, 81-89 (D.D.C. 2007) (Lambert, J.) (presaging Eleventh Circuit's analysis here) with *United States ex rel. Landis v. Tailwind Sports Corp.*, 51 F.Supp.3d 9, 34-37 (D.D.C. 2014) (Wilkins, J.) (adopting *Sanders/Sikkenga* analysis), as well as the Seventh Circuit. *Compare, e.g., United States ex rel. Salmeron v. Enterprise Recovery Sys.*, 464 F. Supp. 2d 766, 768-70 (N.D. Ill 2006) (Shadur, J.) (rejecting *Hyatt*'s analysis) with *United States ex rel. Bidani v. Lewis*, 1999 U.S. Dist. LEXIS 3530 at *9-24 (N.D. Ill. March 12, 1999) (Hart, J.) (adopting *Hyatt*'s analysis). Further disparities exist across the district courts in the undecided circuits. *See, e.g., United States ex rel. Wood v. Allergan, Inc.*, 246 F. Supp. 3d 772, 800-03 (S.D.N.Y. 2017) (endorsing analytical framework

ultimately adopted by Eleventh Circuit here), *rev'd on other grounds*, 899 F.3d 163 (2nd Cir. 2018); *United States ex rel. Giffith v. Conn*, 117 F. Supp. 3d 961, 984-87 (E.D. Ky. 2015) (adopting *Sanders/Sikkenga* analysis); *United States ex rel. Millin v. Krause*, 2018 U.S. Dist. LEXIS 65801 at *6-20 (D.S.D. April 19, 2018) (adopting *Hyatt* analysis). The urgent need for the clarification only this Court can provide is demonstrated by the pervasive, ongoing confusion about Section 3731(b)(2)'s proper meaning and its disparate application among the federal courts.

Where, as here, the courts of appeals are in irreconcilable disagreement about the proper interpretation of a federal statute of limitations, the Court should grant review to ensure a nationally uniform limitations period. *See, e.g., Green v. Brennan*, 136 S. Ct. 1769, 1775 (2016) (granting certiorari to resolve circuit split over the proper accrual date for Title VII constructive discharge claims); *Graham*, 545 U.S. at 414 (granting certiorari to resolve circuit split over the applicable limitations period for retaliation actions under the False Claims Act); *Bay Area Laundry & Dry Cleaning Pension Trust Fund. v. Ferbar Corp.*, 522 U.S. 192, 200 (1997) (granting certiorari to resolve circuit split and establish uniform statute of limitations accrual date for unpaid withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980).

The Eleventh Circuit's opinion provides the Court the opportunity to conclusively decide whether a relator can invoke Section 3731(b)(2) where the government has not intervened, and, if so, whether

the statute of limitations begins to run based on the relator's knowledge of the alleged violation, or the United States' knowledge of the alleged violation. Respondent Hunt agrees that this case provides an appropriate vehicle by which the Court can apply the unambiguous text of Section 3731(b)(2) to ensure the uniform, nationwide application of the False Claims Act.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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